Second, to comply with the Congressional mandate that the timeframe "will be the usual period under such circumstances" and that there is "no preference" to cellular providers the timeframe to gauge action or inaction must be computed based on the specific type of zoning request in question. This is because under zoning ordinances different categories of zoning requests typically have different substantive and procedural requirements and thus take different amounts of time.

Thus, the typical timeframe for a variance request by a cellular provider has to be computed separately and distinct from that applicable to a special land use request, which is separate from a site plan approval and so on.

By analogy, a full power commercial radio or television broadcast license issued by this Commission (which can take several years to obtain) is substantially different from a low power community TV station license, which is different again from an amateur radio license -- and all will have different timeframes for license issuance -- even though they all might be categorized broadly as radio or TV licenses.

To give this Commission an illustration, "variances" often are permissions for uses that are not allowed in the zoning district in question, such as a commercial use in a residential area or any other request for relief from otherwise applicable zoning ordinance requirements (such as setback requirements or height requirements). Thus, a person submitting a variance request, in effect, is asking for a waiver in a specific instance of a local law, statute or ordinance that would otherwise be applicable. As described above, variances

typically require notice to all land owners within several hundred feet of the parcel of land in question, require such notice to be given a specified number of days or weeks in advance of a hearing, and have their own unique hearing requirements.

By contrast, special land uses are different. They are often land uses that by local law are in concept approved for a certain local zoning district but which require certain administrative or legislative approvals before the use can be commenced. If only administrative level approval is required this may require the filing of appropriate plans and information with the zoning administrator (and obtaining his or her approval) with no requirement for notice to nearby landowners, hearings or the like.

The preceding illustrates the substantial differences between different types of local zoning approvals -- and consequent substantial differences in their timing -- and could easily be expanded. Suffice to say that Congress was well aware of the many different types of zoning permissions that can be present and which vary substantially from municipality to municipality and state to state. For this reason, the Congressional directive that the time period for judging a local government action is "the usual period under such circumstances" means that it has to be computed for the particular type of zoning permission being sought by a wireless provider.

The Commission's reference in the NPR at ¶ 138 to "building permits" as a type of zoning or land use approval on which it seeks information on the average length of time for their issuance is puzzling. This is because typically building permits do not involve the

zoning process at all, but instead involve the issuance of a building permit or electrical permit under certain safety-related construction codes such as those promulgated by BOCA (Building Officials Code & Administrators International, Inc.) and adopted by municipalities. Such permits are typically handled by a municipal engineering department which is separate from zoning and land use functions. CCO assume that the Commission's reference to building permits in the NPR was erroneous.

Third, to comply with the Congressional directive, the Commission must distinguish between larger, complicated and more controversial zoning requests and those that are not.

To illustrate the preceding point, renovations to homes often require a variance. This is because adding a room to a house or replacing a garage may violate either setback requirements or height requirements.[3] Frequently a homeowner contemplating remodeling or an addition finds that the new room, new garage or the like they are proposing may extend a small distance beyond the applicable setback or height requirement.

Typically permission to violate these otherwise applicable ordinance requirements requires a variance which, if consented to by the adjacent homeowner, is usually granted. By contrast, a request to install a cellular tower in the middle of a residential subdivision might, under local law, also be considered a variance. However, due to its impact on the area

[3] In zoning law a setback requirement is a requirement that a building or other structure come no closer than X feet to a property line. Height requirements are both absolute and also typically restrict the number of square feet of vertical surface that may extend above a certain point.

such a request is radically different from the residential addition scenario just described, although both legally may be "variance requests."

In order to comply with the Congressional directive that the time period is "the usual under such circumstances" (and that cellular providers get no preference), for the cellular tower variance situation just described the applicable timeframe for measuring action should be that typically applicable if a variance were requested to allow a fast food restaurant, television tower or tall billboard (or similar commercial or industrial structures) in a residential subdivision.

As the Commission can readily discern, the preceding reference points for measuring time are the only ones that make sense. By way of analogy, to do otherwise would be the same as measuring whether this Commission took too long to act on certain requests by using the average time period that it takes for the Interior Department, Agricultural Department, or Department of Defense to act. Similarly, within this Commission, the time period for action on a given class of pleading (for example, petitions for special relief) can vary substantially depending on their subject matter. And it makes no sense to judge the time period for granting a commercial TV station broadcast license by the time period applicable for an amateur radio license, although both are "licenses."

Procedurally, the Commission's rules should require any provider seeking relief from the Commission based upon an alleged "failure to act" by a unit of State or local government to set forth with specificity the information set forth below. Absent such information the

petition should be immediately rejected by the Commission.

The information in question should include the following:

-- The specific type of approval sought from the State or local government, such as a variance, special land use, site plan approval or other, together with copies of the provider's application to the local unit of government and a copy of the local ordinance section under which it is filed.

-- For the specific type of approval (variance, special land use, and so on) sought by the provider, a listing for the municipality in question of requests for the same type of approval (variance, special land use, and so on) within the last three years, and for each such request how long it took for the municipality to act. Just as with this Commission, this information typically is available to the provider by examining the files of the local unit in question.

-- A statement of which of the preceding requests the provider deems comparable to its situation as involving similar circumstances, such that "the generally applicable timeframe for zoning decisions" should be computed based upon these instances.

Requiring a provider to provide this particularized information is the only way that this Commission and the provider's request can comply with Section 332(c)(7)(B)(v). At bare minimum a provider has to be able to show that the time period that has elapsed since it filed an administratively complete request with the local government (no defects or omissions in the filing) exceeded the average length of time it took for that municipality to act on similar types of approval of the same nature within the last three years. Such a showing of exceeding the average length of time should not be enough by itself to show that the statute has been violated, but it has to be the minimum requirement to establish a *prima facie* case for a valid complaint to be filed and accepted by this Commission.

Failure to require such a particularized showing by a provider will violate the Congressional intent and will burden this Commission and local governments with mere platitudes and pro forma recitations by cellular providers that "a municipality has taken too long." By contrast, requiring this particularized information will deter frivolous filings, often by showing a provider that it is not being treated in violation of the Act.

The Commission's general rules must be supplemented to provide for physical service of all complaints and papers on the local unit of government whose action is being challenged. Desultory methods of attempting to provide notice (which CCO have seen providers attempt in the past when they have instituted procedures against municipalities at this Commission) such as simply faxing a copy of a Commission filing to a municipality's general fax number, cannot and should not suffice.

Thus, the Commission's rules must be supplemented to provide that any and all papers have to be served on the Clerk (or other local official holding a comparable position) of the local unit of government in question and (if different) on the person or persons at the City who would be served in the case of a court appeal of any local court appeal of the zoning decision being challenged. CCO are aware of situations where, for example, cable operators or other entities regulated by the Commission have left documents at the residences of municipal officials (other than a clerk) and have contended that this is adequate service and notification. The simple answer is that it is not.

In general, the Clerk's office of a local government -- and the additional official, if any, on whom appeals of zoning matters must be served -- is the local government person specified by law to be served with such papers and has the duty, responsibility and expertise to see that they are appropriately logged in, promptly transmitted to the appropriate officials, and otherwise dealt with such that the local unit of government in question can respond to the proceeding in question within the timeframes allowed by law. As the Commission can appreciate, this is directly analogous to this Commission's requirements that papers and other documents be filed with the Secretary of the Commission.

Finally, the Commission must allow in its rules adequate time for the respondents in these cases, which will be local units of government, to hire the specialized FCC legal counsel which will often be necessary for them to have adequate representation.

The key here is for this Commission to recognize that unlike private industry, local units of government typically can only retain outside counsel with the prior approval of their legislative body -- a city council, city commission, county board or the like. Such legislative bodies typically meet infrequently (once or twice a month) and require that items such as this be placed on their agenda several days or weeks prior to the meeting at which the item is considered.

The result is that it can easily take four to six weeks for a municipality to retain outside counsel, whereas a private party -- which is whom this Commission overwhelmingly deals with -- can retain outside counsel by a phone call on a moment's notice.

As the Commission is aware, there is a specialized bar which practices before the Commission, and parties appearing before this Commission are well advised to retain its members if they wish to be effectively represented.

Given that this Commission now is proposing to deal extensively with local units of government throughout the country, it must adapt its procedures to make sure that these local units of government, like private industry, are afforded adequate time to obtain specialized representation. This Commission's rules should therefore specify that a municipality has a minimum of 45 days to respond to any complaint, with such time measured from the date of service upon the local government.

V. THE COMMISSION SHOULD DEFINE "FINAL ACTION" CONSISTENT WITH OTHER APPEALABLE ACTIONS

The Commission in its NPR seeks comment on the definition of "final action", meaning that action which is appealable to the Commission under its proposed rule.

The simple answer is that under the 1996 amendments to the Communications Act, final action is (and must be) that action which would otherwise be directly appealable to a local court by a cellular provider. This is expressly indicated by the Conference Committee Report which states that:

> "The term 'final action' in [Section 332(c)(7)(B)(v)] means final administrative action at the State or local government level so that a party can commence action under the subparagraph rather than waiting for the exhaustion of any independent state court remedy otherwise required." Conf. Rep. No. 458, 104th Cong., 2d Sess., 209 (Jan. 31, 1996).

Congress' intent thus was to prevent a party from having to exhaust its local judicial remedies before going to the courts or to this Commission. But it did require compliance with all local, State and government procedures. This Commission's suggestion that it should somehow treat local boards of zoning appeals as not being part of State or local government thus violates the Act because they unquestionably involve action "at the State or local government level."

And boards of zoning appeal are not State courts so the Commission's apparent categorization of boards of zoning appeal as courts is incorrect. To restate, boards of zoning appeals are administrative bodies of a local unit of government. They often have both sole jurisdiction over some zoning matters (e.g. variance requests) and often are the administrative entity to whom a planning commission decision must go before it can be finalized and appealed to State court.

In their review capacity, boards of zoning appeal provide an opportunity for review and modification of planning commission decisions before they become final and can go to court. As such, parties can focus on any defects in the action of the planning commission. Parties also must focus on their main and viable claims and to disregard those that are secondary or have little chance of success.

Thus, in a general respect, a municipality's board of zoning appeals or similar entity bears a relationship to a planning commission or zoning commission similar to that which the Commission bears to its subordinate Bureaus. In each case a decision of a "higher" body

affords a salutary chance for review, refinement and the correction of errors before the parties may proceed to court. Many problems in fact are corrected at this level (the Commission should be aware that in many cases local boards of zoning appeals or comparable bodies are able to resolve zoning disputes involving cellular towers in a manner that comports with the law and is acceptable to cellular providers). For these types of reasons, the Commission's proposal to allow parties to directly appeal a decision of a planning or zoning commission to the Commission makes no sense, any more than would a proposal to allow a party to appeal to Federal Court the decision of the Cable Bureau or Wireless Bureau where the full Commission has not acted.

In addition, in many States, boards of zoning appeal (or similar bodies) typically are the only agency that can grant variances (similar to a waiver, as described above) from ordinance provisions that otherwise apply. Thus, for example, they often are the unit of local government to whom a wireless provider must apply if it seeks to place a cellular tower in a residential subdivision if (for example) the zoning ordinance of the community in question makes no allowance for such structures in residentially zoned districts.[4]

As proposed, the Commission's rule may be argued to completely bypass boards of zoning appeals such that zoning variance requests would be filed directly with this Commission in the first instance. Any such result is a direct violation of the statute, as well

[4] This is part of the normal function of the variance process to afford the greatest protection to sensitive areas of the municipality, such as (where necessary) considering whether non-residential uses should be allowed in residential areas.

as of Constitutional principles. It is another illustration of how the Commission's proposal to bypass necessary portions of the local and State zoning decision-making process is incorrect.

Fortunately, as indicated by the emphasized language in the Conference Report set forth above, Congress' intent was to allow appeals under Section 332(c)(7)(B) to go directly to court or this Commission only after completion of all action at the "State or local government level" but without the need for previously having exhausted State court remedies. This Commission must therefore adopt as the definition of "final action" as "that action which is otherwise appealable as of right to the local courts under the laws of the municipality and state in question." It is generally well set forth in the laws of each of the 50 states as to what, for zoning purposes, is a final local action, appealable to court as of right by an aggrieved party.

The Commission should also be aware in this regard that due to the large numbers of local units of government -- 38,000 -- each of whom has its own unique zoning procedures and classifications, that any attempt by this Commission to intrude in the local process to distinguish one part of a local government(e.g., board of zoning appeal) from another (e.g., planning commission) will fail simply because of its failure to comport with the actual categories and classifications used in particular local zoning ordinances. It is presumably for

this reason, among others, that Congress wisely prevented this Commission or the Federal courts from intruding in this area and defined final action as being that action which under local is appealable, as of right, to local courts.

VI. PRIVATE CORPORATIONS AND ASSOCIATIONS ARE NOT "STATE OR LOCAL GOVERNMENTS OR POLITICAL SUBDIVISIONS THEREOF" UNDER THE ACT

Section 332(c)(7)(b)(v) of the Act does not include private homeowner associations or other private entities within the definition of "State or local government or any instrumentality thereof." Political subdivisions of a State, such as cities and towns, are completely separate from corporations and private associations. The activities in which both entities are engaged and the goals of the two entities are also very different. The difference in goals results in the conclusion that private corporations and associations cannot be considered a "State or local government or political subdivisions thereof." To include such entities within the definition of local government or qualify the entities as political subdivisions would go against well-established principles of municipal law and constitute an expansion of FCC authority beyond that authorized by Congress.

The traditional and well-established definition of a municipal corporation is a body "politic," created as a corporation under the authority of a State legislature "with all of the attributes of corporate identity, but endowed with a public character by virtue of having been invested by the legislature with subordinate legislative powers to administer local and internal affairs of the community." 56 Am. Jur. 2d § 4. As a political subdivision of the

State, a municipal corporation is viewed as a "convenient agency' for the 'exercise of such of the governmental powers of the state as may be intrusted to it." Trenton v. New Jersey, 262 U.S. 182, 185-186; 43 S.Ct. 536; 67 L.Ed. 937 (1922). A municipal corporation has as its goal the public health, safety, and welfare of its citizens residing within the municipality's boundaries and a municipality is created to, "aid the state government in the regulation and administration of local affairs." Ottawa v. Carey, 108 U.S. 110, 121; 2 S.Ct. 361; 27 L.Ed. 669 (1882). A corporation or association, although formed pursuant to State law, has as its goal private concerns such as the maximization of profit, protections from liability, or advancement of a narrow interest. For example, a private homeowners association seeks to preserve the value of homes in the association. An incorporated association is authorized to exercise authority over its members in those matters related to the association only. An association does not have authority or jurisdiction to regulate other associations,. corporations, or governments. In contrast, municipalities are granted much broader authority under state constitutions and state laws to exercise police powers to legislate for the welfare of all residents and regulate a wide-range of activities, including those activities which occur in private homeowner associations. By including private corporations and associations within the definition of state and local governments, the Commission would alter the traditional definitions of two separate entities that have divergent interests and powers.

Interpreting the Act to allow private associations and corporations to be considered political subdivisions of the state is inconsistent with the traditional distinction between

municipal corporations and private corporations and would impermissibly expand the Commission's jurisdiction.

VII. CONCLUSION

In light of the foregoing, CCO respectfully requests that the Commission exercise restraint in promulgating rules concerning wireless towers and local zoning.

Respectfully submitted,

CONCERNED COMMUNITIES AND ORGANIZATIONS

By: _____

John W. Pestle
Patrick A. Miles, Jr.
Mark E. Nettleton

Business Address and Telephone:

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
Suite 1700
333 Bridge Street, N.W.
Grand Rapids, MI 49504
(616) 336-6000

Dated: October 8, 1997

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934	)))))	WT Docket No. 97-197

COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS CONSISTING OF:

AZ: Town of Paradise Valley

CO: City and County of Denver, City of Lakewood

DC: National Association of Counties

FL: City of Coconut Creek, City of Fort Lauderdale

IL: City of Breese, City of Naperville, City of Rockford, City of St. Charles, Village of Western Springs

MI: City of Grand Rapids, City of Detroit and 24 other Michigan municipalities

MO: City of Gladstone, City of Springfield

NC: Piedmont Triad Council of Governments consisting of 24 North Carolina local governments and Town of Chapel Hill

NJ: Bridgewater Township

NV: City of Las Vegas

OH: City of Canton, City of Eastlake

TX: City of Dallas, City of Grand Prairie, and 20 other Texas municipalities

UT: City of Provo

John W. Pestle
Patrick A. Miles, Jr.
Mark E. Nettleton
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
333 Bridge Street, N.W.
Grand Rapids, MI 49504
Their Attorneys

October 8, 1997

TABLE OF CONTENTS